

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AMERICAN INTERNATIONAL SPECIALTY LINES)	
INSURANCE COMPANY,)	
)	
Plaintiff,)	
-against-)	Case No. 05 C 6386
)	
NWI-1, Inc. (F/K/A/ FRUIT OF THE LOOM, INC.),)	
LEPETOMANE II, INC., as Trustee of the Fruit of)	
the Loom Successor Liquidation Trust, and)	Judge Gottschall
LEPETOMANE III, INC., as Trustee of the Fruit of)	Magistrate Judge Mason
the Loom Custodial Trust.)	
)	
Defendants.)	

**FIRST AMENDED COMPLAINT OF THE UNITED STATES AS PLAINTIFF-
INTERVENOR**

Plaintiff-Intervenor the United States, through the Attorney General and on behalf of the United States Environmental Protection Agency, the United States Nuclear Regulatory Commission, the United States Department of Interior, and the United States National Oceanic and Atmospheric Administration, files this First Amended Complaint as of right under Rule 15(a) of the Federal Rules of Civil Procedure because no responsive pleading to the Complaint of the United States as Plaintiff-Intervenor (Docket No. 70) has yet been filed. The United States alleges as follows:

I. Nature of the Case

1. This is a civil action for a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* The United States seeks a declaratory judgment with respect to coverage under a Pollution Legal Liability Select insurance policy (the Policy) issued by Intervenor-Defendant American International Specialty Lines Insurance Company (AISLIC) to Fruit of the Loom (FTL), a predecessor of the Defendants, for liabilities owed by the Defendants to the United States arising from the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601, *et seq.*, and the Atomic

Energy Act (AEA), 42 U.S.C. § 2011, *et seq.* Those liabilities arise at seven contaminated Sites whose total clean up costs the United States estimates will exceed \$100 million. A copy of the Policy is attached to AISLIC's Complaint as Exhibit A and is incorporated by reference.

II. Jurisdiction

2. This Court has subject matter jurisdiction over the action of the United States because the Court has jurisdiction over the main action brought by AISLIC against Defendants under 28 U.S.C. § 1332. The Court also has independent jurisdiction over the action of the United States under 28 U.S.C. § 1345, and has authority to grant the relief requested under 28 U.S.C. § 2201. The United States Department of Justice is authorized to bring this action pursuant to 28 U.S.C. §§ 516-519.

III. Facts Giving Rise to AISLIC's Liability under the Policy

A. Pollution Legal Liability Select Policy

3. On or about October 30, 1998, AISLIC issued the Policy, identified as a Pollution Legal Liability Select Policy with Policy No. PLS 267 53 70, to FTL.
4. FTL is the "Named Insured" under the Policy and paid the full Policy Premium of \$3,583,515.
5. The Policy period runs from October 30, 1998 to October 30, 2008.
6. The Policy provides coverage, under Coverage K, for known pollutants

... for Loss which the Insured sustained for Clean-Up Costs the Insured first incurs **or is liable for**, on or after July 31, 1998 and before the Termination Date:

- (a) At an Insured Property pursuant to the Remedial Action Plan if such Clean-Up Costs are incurred in the Clean-Up of Pollutants

which were discovered through and originated from the performance of the Remedial Action Plan; or

- (b) **Beyond the boundaries of the Remedial Action Plan** if such Clean-Up Costs are incurred in the Clean-Up of Pollutants which were discovered through and originated from the performance of the Remedial Action Plan . . . **[Emphasis supplied.]**

(Policy at Coverage K)

7. The Policy provides coverage, under Coverage L, for unknown pollutants

. . . for Loss which the Insured sustained for Clean-Up Costs the Insured first incurs **or is liable for** on or after the Inception Date and before the Termination Date, for pollutants different from those identified in the Remedial Action Plan for a Clean-Up at an Insured Property . . . if

. . . **[t]he Pollutants originated from an Insured Property . . . [Emphasis supplied.]**

(Policy at Coverage L)

8. The following Sites (the Sites) are among the Insured Properties under Coverages K and L:

- a. **St. Louis Plant Site** in St. Louis, Michigan;
- b. **Breckenridge Site** in St. Louis/Breckenridge, Michigan;
- c. **Residue Hill Site** in Chattanooga, Tennessee;
- d. **Hardeman County Landfill Site** in Toone, Tennessee;
- e. **Hollywood Dump Site** in Memphis, Tennessee; and
- f. **Ventron/Velsicol/Berry's Creek Site** in New Jersey.

(Policy at Endorsement 7)

9. The coverage amount for Coverage K is \$50,000,000 per incident and \$100,000,000 coverage section aggregate.

10. The coverage amount for Coverage L is \$50,000,000 per incident and \$100,000,000 coverage section aggregate.
11. Coverages K and L each have a Self Insured Retention (SIR) of \$44,500,000.
12. "Loss" is defined under the Policy as "... (3) Clean-Up Costs." (Policy at ¶ VI.N)
13. "Clean-Up Costs" under Coverages K and L are:
 - (2) ... costs and expenses of investigation and remediation strategies, specifications, consents, orders, decrees, contracts, or work plans already developed or which are in development or of the type and nature previously developed or removal of, or rendering non-hazardous or less hazardous, Pollution Conditions to the extent required by Environmental Laws, or by governmental or court order or directive, or required or approved by governmental agency, acting under authority granted by Environmental Laws;
 - (3) Legal fees and costs expended by or on behalf of the Insured in connection with the investigation or removal of, or the rendering non-hazardous or less hazardous of Pollution Conditions, provided such fees and costs are reasonable and necessary and are incurred with the written consent of the Company; or
 - (4) Costs and expenses of investigation or removal of or rendering non-hazardous or less hazardous, Pollution Conditions if such costs and expenses actually have been incurred by the government or any political subdivision of the United States of America, any state thereof, or Canada or any province thereof or by a third party.

(Policy at ¶ VI.F)

14. The Policy provides that "[b]ankruptcy or insolvency of the Insured or of the Insured's estate shall not relieve the Company of any of its obligations hereunder." (Policy at ¶ VII.M)
15. The Policy further provides:

Sale or Transfer of Covered Locations – Under Coverages K and L, in the event the Insured Property is sold, or if ownership or operational control is transferred by Named Insured prior to the completion of the Clean-Up to which this Policy applies, this Policy shall remain in full force and effect, subject to its terms of conditions,

only if:

1. The new owner or operator of the Insured Property fully complies with all of the terms, conditions, duties, and obligations of the Named Insured which are set forth in this Policy.
2. The new owner or operator of the Insured Property fully complies with all the terms, conditions, duties, and obligation of Remedial Action Plan.
3. The new owner or operator of the Insured Property must allow the company complete access to the Insured Property covered under this policy.

(Policy at ¶ VII.P)

B. The Bankruptcy Settlement Agreement and Order

16. On December 29, 1999, FTL and various of its subsidiaries, including NWI Land Management (NWILM), filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code.
17. At the time FTL filed the bankruptcy petition, FTL and NWILM owned and/or had assumed environmental liability for the Sites.
18. The United States filed proofs of claim during the bankruptcy against FTL under CERCLA for response actions, response costs, and Natural Resource Damages with respect to certain of the Sites.
19. On April 17, 2002, FTL, the United States and the States of Illinois, Michigan, New Jersey, and Tennessee (the States) lodged a proposed Settlement Agreement in the bankruptcy proceeding. A copy of the Settlement Agreement is attached to the Answer and Counterclaim as Exhibit 2 and is incorporated by reference.
20. The Settlement Agreement included provisions concerning the Sites.

21. Upon information and belief, AISLIC had notice of the proposed Settlement Agreement.
22. The Settlement Agreement was subject to public notice and comment and the approval of the Bankruptcy Court before it became effective.
23. The Bankruptcy Court approved the Settlement Agreement on August 9, 2002. The Settlement Agreement became effective on August 15, 2002. A copy of the Bankruptcy Court order approving the Settlement Agreement (Bankruptcy Order) is attached to the Answer and Counterclaim as Exhibit 3 and is incorporated by reference.
24. AISLIC did not raise any objection to the Settlement Agreement prior to its approval by the Bankruptcy Court.

C. Creation of Successor Liquidation Trust and Custodial Trust

25. The Bankruptcy Order created two Trusts: a successor liquidation trust (Successor Trust) and a custodial trust (Custodial Trust)
26. The beneficiaries of the Successor Trust and the Custodial Trust include the United States and the States.
27. On August 19, 2002, NWI-1, Inc., NWILM, and the Successor Trust entered into a Successor Liquidation Trust Agreement, which is attached to the Answer and Counterclaim as Exhibit 4 and is incorporated by reference.
28. On August 19, 2002, NWI-1, Inc., NWILM, and the Custodial Trust entered into the Custodial Trust Agreement, which is attached to the Answer and Counterclaim as Exhibit 5 and is incorporated by reference.
29. The Successor Trust is a successor to FTL and NWILM formed to liquidate their assets relating to NWILM in order to provide, among other things, funding to the Custodial Trust.

30. The Successor Trust succeeded to the liabilities of FTL and NWILM with respect to the Sites for the purpose of obtaining recoveries under various insurance policies, including the Policy, as provided in the Settlement Agreement.

31. The Settlement Agreement provides that:

The Plan of Reorganization and/or the Bankruptcy Court order shall vest in the NWI/FTL Successor (for the benefit of the Governmental Parties, Custodial Trust, Velsicol Environmental Trust Fund, and the FTL Insured Entities under the PLL Policy [Policy]) all of NWI [NWILM], FTL, and the FTL Entities' interest in claims/proceeds/recoveries against/from the PLL Policy [Policy].

(Settlement Agreement ¶ 8)

32. The Custodial Trust was established to own certain properties, carry out administrative functions related to those properties, manage and/or fund implementation of response actions or Natural Resource Damage assessment and restoration actions at those properties, and sell those properties.

33. The Sites and/or portions thereof are among the properties the Settlement Agreement transferred to the Custodial Trust.

34. Both the Successor Trust and the Custodial Trust maintain separate trust accounts for each of the Sites.

35. The Settlement Agreement dictates that the Successor Trust pay proceeds/recoveries from the Policy related to the Sites to the Custodial Trust, which will then apply such funds to the individual trust account for each Site for which recovery was obtained.

36. The Settlement Agreement requires the Custodial Trust to use the individual trust accounts to fund response actions or costs at the corresponding Sites and/or to restore, replace, acquire natural resources or assess Natural Resource Damages related to the corresponding Site.

37. The Settlement Agreement provides that the United States and the States may obtain payment from a given trust account for past and future response costs incurred after August 1, 2001 at the corresponding Site, and for other costs as specifically set forth in the Settlement Agreement.
38. The Settlement Agreement also grants the United States Allowed General Unsecured Claims totaling \$64,552,537 for past and future response costs and Natural Resource Damages at three of the Sites.

D. The Sites

39. The Sites (*see* ¶ 8) and/or portions thereof were previously owned by subsidiaries of Farley/Northwest Industries and/or NWILM, or by subsidiaries of those subsidiaries.
40. The Sites (*see* ¶ 8) include each corresponding property description in Appendix C of the Settlement Agreement, *see* Settlement Agreement ¶ 1 (definition of "Seven Facilities"), and:

(i) for those Facilities (or parts thereof) now or hereafter included on the National Priorities List ("NPL"), 42 U.S.C. § 9605, all areas as defined by EPA for purposes of the NPL, including the migration of hazardous substances therefrom and any later expansion of such Facility as may be determined by EPA, and any affected natural resources, or

(ii) for those Facilities (or parts thereof) not included on the NPL, all areas affected or potentially affected by the release or threatened release of hazardous substances, and affected natural resources, as a direct or indirect result of the operations or activities occurring on or in the vicinity of the property which gave rise to the release or threatened release, including the migration of hazardous substances therefrom (but not including locations of other releases of hazardous substances resulting from the off-property disposal of hazardous substances generated from such operations or activities)

Settlement Agreement ¶ 1 (definition of "Facility")

41. The St. Louis, Michigan Site includes portions of the Pine River.

42. Farley/Northwest Industries and NWILM assumed responsibility for any liabilities or costs arising out of the Sites in a December 12, 1986 Assumption and Indemnity Agreement.
43. Subsequently, Farley/Northwest Industries changed its name to FTL.
44. Each of the Sites is contaminated with Pollutants that require Clean Up within the meaning of the Policy.
45. The United States and the States have provided the Successor Trustee with itemized cost summaries of past costs and/or estimates of future costs expected to be incurred at several of the Sites.
46. On information and belief, the Successor Trustee has sent quarterly reports to AISLIC that include the cost information provided to it by the United States and the States.
47. The costs already incurred by and/or the future costs and natural resource damages for which the Successor Trustee is liable at the Sites exceed the Self Insured Retention under Coverages K and L of the Policy and exceed the aggregate limit of the Policy.
48. If the Successor Trustee cannot satisfy the future Clean Up costs at the Sites, Clean Up work may either have to be delayed indefinitely or paid for by the public via the Superfund to the extent funding becomes available.

**IV. First Claim for Relief
(Declaratory Judgment - Policy Effective)**

49. Intervenor-Plaintiff the United States refers to and incorporates by reference both Paragraphs 1 through 48 of this Complaint and also the factual allegations contained in the Answer and Counterclaim of the Successor-Trustee to the extent they are not inconsistent with Paragraphs 1-48 of this Complaint.
50. The Bankruptcy of FTL did not relieve AISLIC of its obligations under the Policy, in accordance with Policy ¶ VII.M.
51. The vesting of certain rights and assets in the Successor Trust as successor to FTL/NWILM did not affect the validity of the policy because the Successor Trustee has complied with all applicable terms, conditions, duties, and obligations of the Policy and Remedial Action Plans and has not denied AISLIC access to any Site, in accordance with Policy ¶ VII.P.
52. Any substantive requirement of the Policy with respect to coverage for any Site has been satisfied or will be satisfied within any applicable deadline.
53. The United States is entitled to a declaratory judgment that the Policy is now and was at all times valid and enforceable.
54. The United States is entitled to a declaratory judgment that the Successor Trust as successor to FTL/NWILM is a beneficiary of the Policy.
55. The United States is entitled to a declaratory judgment that the Successor Trust has satisfied its obligations under the Policy.

**V. Second Claim for Relief
(Declaratory Judgment – AISLIC's Obligations)**

56. Intervenor-Plaintiff the United States refers to and incorporates by reference both Paragraphs 1 through 55 of this Complaint and also the factual allegations contained in the Answer and Counterclaim of the Successor-Trustee to the extent they are not inconsistent with Paragraphs 1-55 of this Complaint.
57. The Self-Insured Retention applicable to Coverages K and L of the Policy has been exhausted.
58. AISLIC is obligated to satisfy the Successor Trusts' claims for Clean-Up Costs at the Sites that the Successor Trust has incurred, is liable for, or becomes liable for during the Policy period.
59. The United States is entitled to a declaratory judgment that AISLIC is obligated to satisfy the Successor Trust's claims for each of the Sites.

VI. Prayer for Relief

WHEREFORE, the United States prays that this Court:

1. Enter a declaratory judgment against AISLIC, in favor of the United States, which declares that:
 - a) The contract of insurance between AISLIC and the Successor Trust as successor to FTL/NWILM is now and was at all times valid and enforceable;
 - b) The Successor Trust has satisfied all of its obligations under the Policy;
 - c) AISLIC is obligated by virtue of the contract for insurance to pay to the Successor Trust amounts for Clean-Up Costs that it has incurred or is liable for or becomes liable for during the Policy period at the Sites even if such costs are not actually paid

by the Successor Trust until after the Policy period has ended;

- d) The Self-Insured Retention under the Policy has been exhausted; AND
2. Grant the United States such other relief as this Court deems just and proper, including, but not limited to, enforcement costs and other relief available under CERCLA and other applicable environmental, or other, laws.

Dated: July 10 , 2006

Respectfully submitted,

SUE ELLEN WOOLDRIDGE
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

ERIC D. ALBERT
STEVEN R. BAER
Environmental Enforcement Section
Environment & Natural Resources Division
United States Department of Justice
Post Office Box 7611
Washington, D.C. 20044-7611
202-514-2794 (202) 514-4180 Fax
eric.albert@usdoj.gov

ALAN S. TENENBAUM
National Bankruptcy Coordinator
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
Post Office Box 7611
Washington, D.C. 20044-7611
202-514-5409

PATRICK J. FITZGERALD
United States Attorney
Northern District of Illinois

JONATHAN HAILE
Assistant United States Attorney
Northern District of Illinois
219 S. Dearborn Street
5th Floor
Chicago, IL 60604
(312) 886-2055
jonathan.haile@usdoj.gov

CERTIFICATE OF SERVICE

I, Eric D. Albert, certify that on July 10, 2006, I electronically filed the foregoing First Amended Complaint of the United States as Plaintiff-Intervenor with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

ERIC D. ALBERT
Environmental Enforcement Section
Environment & Natural Resources Division
United States Department of Justice
Post Office Box 7611
Washington, D.C. 20044-7611
202-514-2794 (202) 514-4180 Fax
eric.albert@usdoj.gov